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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

MICHAEL A. DOYLE
FREDERICK H. VON UNWERTH
PETER KONTIO
ALSTON, MILLER & GAINES
1200 C&S National Bank Building
35 Broad Street
Atlanta, Georgia 30303

RICHARD A. POSNER
1222 East Fifty-Sixth Street
Chicago, Illinois 60637
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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1.

To the submission in our Petition for Certiorari that this Court should review the decision below because it excludes a major branch of agriculture from the benefits of the Capper-Volstead Act, casts a cloud of uncertainty over the entire movement toward integrated agricultural production, and may well—

petitioner being the sole national cooperative of producers of broiler chickens—lead to far-reaching changes in the structure of poultry production inimical to everyone concerned, the Department of Justice replies only (and in a footnote) that the consequences of the decision below are "speculative" (Brief Opp. 6 n.4.)[1] But since the Department does not contest the fact that almost ten percent of broiler growers are already employees of integrated producers and that retention of their status as "farmers" would be extremely valuable to these producers for tax as well as antitrust reasons (Pet. 11-12 and n. 7, 8), we submit that what is speculative and unfounded is the Department's hope that the poultry industry will fail to react to a decision so threatening to its welfare.

The simple fact, which the Department's footnote should not be allowed to obscure, is that there is a growing movement toward the integrated production of poultry and other agricultural products. This trend can only be accelerated by a decision that tells the producers that to retain the benefits of "farmer" status they must integrate into the growout phase and make the growers their employees. A decision of such consequence to a major industry requires prompt review by this Court, even if there exists the theoretical possibility that the same legal questions may arise years hence (long after the broiler industry, at least,

[1] The Department suggests that all NBMA's members need to do is simply avoid violating the antitrust laws. (Br. Opp. 6 n. 4). The Solicitor General's statement of the case (Br. Opp. 2) characterizes the activities challenged in the Complaint as a routine exchange of price information and an attempt to insure a stable market for broilers. Such activities do not constitute a hard-core Sherman Act violation. While the alleged activities could, if proved, perhaps amount to a technical violation of Section 1 of the Sherman Act in a non-immune industry, these efforts are also the type of conduct which is widely believed to be beneficial, and indeed essential, in the characteristically fragmented agricultural market. The right to engage in such conduct is not one that the industry will surrender lightly, and it is conceded that integrated producers can retain that right simply by completing their vertical integration into the growout phase of poultry production.

will have complied, through further integration or other measures, with the decision below) in a case involving ducks or turkeys.[2]

2.

The Department of Justice, whose hostility to statutes that provide immunity from the antitrust laws is well known, rejects a functional, purposive approach to statutory construction of the Capper-Volstead Act, instead expressly endorsing the "romantic view" of the statute's meaning—that it was intended to advance the interests of the "traditional farmer" regardless of economic reality (Brief Opp. 7). The Department adopts this approach on the basis of a general conception of legislation as the sale of favors to special-interest groups.[3]

Even if Capper-Volstead were simply special interest legislation on behalf of dirt farmers, there would be no basis for excluding integrated poultry producers from the Act, in view of the fact that integration helps the grower (the Department's conception of a dirt farmer) by shifting most of the risk of market price fluctuation and other uncertainties characteristic of agricultural production from the grower to the integrator.[4] But, more important, the "romantic view" is simply inconsistent with

[2] No conflict between the circuits is imminent, since to our knowledge there are no antitrust cases pending against cooperatives of integrated agricultural producers other than the present case and the private cases against the petitioner, also pending in the Fifth Circuit (Pet 6-7).

[3] Br. Opp. 6 n. 5, citing Landes and Posner, *The Independent Judiciary in an Interest-Group Respective*, 18 J. Law and Econ. 875, 877 (1975).

[4] Assumption of the major production and marketing risks by integrators allows the grower's involvement in production to remain economically feasible, thus keeping rural families on the land and employed in agriculture in accord with the national policy.

the accepted scope of the Act (Pet. 14-15). Owners of plantations are within the Act. So are absentee owners using tenant farmers. So are corporations. So are fully integrated producers —i.e., producers who employ rather than contract with growers. It is too late a date to argue that only the little man is covered by the Capper-Volstead Act. And while it is true that the legislative history contains numerous expressions of solicitude for the small farmer, it is also replete with expressions of concern for the economic welfare of agriculture generally (Pet. 16).[5]

3.

The Department states that the Court below was entitled wholly to ignore the practical view of the responsible federal farm agencies, which have embraced cooperatives of integrated producers as qualified cooperatives, because those agencies "lack antitrust expertise" (Brief Opp. 10).[6] Their lack of such expertise is irrelevant to any issue in this case. If petitioner is a bona fide[7] cooperative of agricultural producers as a matter of

[5] The Department's statement that Congress rejected a proposed amendment that would have extended the Act to integrated producers that "prepare agricultural products for market" (Brief Opp. 7) is inaccurate. The amendment would have extended the Act to producers of *non*-agricultural products made from agricultural components (e.g., textiles from cotton). Pet. 16-17.

[6] In incorrectly stating our contention to be that the Court below failed to give "controlling weight" to the views of the agencies, the Brief in Opposition implies that it gave them some weight. It gave them no weight.

[7] NBMA meets all requirements of the Capper-Volstead Act, including the requirement that *all* its members are producers. The implication in the Department's brief (Br. Opp. 8 n. 10) that two NBMA members do nothing more than process broilers is not supported by the record facts relied upon. Although the two members referred to do not own breeder flocks, hatcheries or feed mills, they are both deeply involved in the live production process through their ownership of the birds at all times, their investment in feed and other growout supplies, their supervision of the growout and their assumption of the major risks of producing and marketing the birds. (R. 529).

agricultural policy, its immunity from Section 1 of the Sherman Act follows automatically. The threshold issue of immunity is decided without reference to antitrust considerations; they come into play only when it is determined that the defendant in the antitrust suit is not immune. This point is so elementary that in the absence of any other effort to suggest a justification for the court of appeals' refusal to give weight to the view of the responsible agencies, we take it to be conceded that the court below failed to follow the teachings of *Bayside Enterprises, Inc. v. National Labor Relations Board*, 429 U.S. 298 (1977) regarding the weight to be accorded the agencies' views in construing the term "farmer" as it appears in the various agricultural statutes.

Respectfully submitted,

MICHAEL A. DOYLE
FREDERICK H. VON UNWERTH
PETER KONTIO
ALSTON, MILLER & GAINES
1200 Citizens and Southern
National Bank Building
35 Broad Street
Atlanta, Georgia 30303
(404) 588-0300

RICHARD A. POSNER
1222 East Fifty-Sixth Street
Chicago, Illinois 60637
Counsel for Petitioner